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# In the Supreme Court of the United States

OCTOBER TERM, 1928

FEDERAL TRADE COMMISSION, PETITIONER

*v.*

ALFRED KLESNER, DOING BUSINESS UNDER THE NAME "SHADE SHOP," HOOPER & KLESNER, RESPONDENT

**PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF**

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# In the Supreme Court of the United States

OCTOBER TERM, 1928

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No. —

FEDERAL TRADE COMMISSION, PETITIONER

*v.*

ALFRED KLESNER, DOING BUSINESS UNDER THE NAME "Shade Shop," Hooper & Klesner, respondent

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## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

The Solicitor General and the Chief Counsel of the Federal Trade Commission pray that a writ of certiorari issue to review a judgment of the Court of Appeals of the District of Columbia, which dismissed the Commission's petition for a preliminary injunction, and for enforcement of its order directing the respondent herein to cease and desist from unfair methods of competition, in violation of Section 5 of "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes." (38 Stat. 717.)

### A. THE FACTS

This is a simple case of unfair competition in commerce in the District of Columbia, consisting of

the adoption by respondents, and their continued use thereafter, of a trade name, to wit, "Shade Shop," almost identical with the trade name "The Shade Shop," long previously adopted, and ever since continuously used by one W. Stokes Sammons to designate his business establishment.

Because the court below did not, as stated in its opinion, analyze the evidence adduced at the trial of this case (R. 425), and because of the basic importance of a clear understanding of the facts before seeking to apply the law—this statement of facts is somewhat longer than would otherwise be the case.

Sammons, the party complaining to the Commission, is an individual, and, as such, in the year 1901, entered into the business of manufacturing and selling window shades, exclusively (R. 98–99), under the name and style of "The Shade Shop." This name is now, and has at all times been, the name of the business established, created, and carried on by Sammons, and has ever been used to single out and identify the business conducted by him. It is not used merely to denote that Sammons makes and sells window shades. Practically all the commercial activities of "The Shade Shop" were carried on under this name—under it, Sammons had become well and favorably known to a substantial portion of the purchasing public, many of whom were not aware that he was personally identified with the business. ( R. 20–21.)

Under this name he advertised in newspapers, periodicals, and telephone directories, and by signs on his place of business; established bank accounts, purchased goods, conducted correspondence, and receipted bills. Under this name, also, telephone inquiries were made of him, written orders were sent to him for goods, supplies were shipped to him, bills and checks were made out to him, and business houses with whom he had dealings carried his accounts. (R. 12, 15, 16, 17, 19, 20, 21, 23, 24, 25, 27, 31, 32, 33, 34, 46–47, 58, 61, 63, 67, 68, 70, 72–74, 79, 83, 86, 97, 99, 100–102, 103, 104, 105, 106, 109, 112–114, 116, 117–118, 122–123, 124, 127, 128–129, 133, 134, 136–140, 143, 148, 149–150, 159, 161–162, 163, 168, 169, 170, 173, 174, 176, 181, 183–184, 187, 192–193, 195, 199, 208, 217, 218, 224, 226, 232, 237, 251, 280, 282, 314, 316, 335–337, 338, 343–356, 366.) In this connection, the following testimony of Sammons (R. 149) is significant:

> Q. During this 15 or 20 years, has there been anybody in the District of Columbia, to your knowledge, who has used the trade name "The Shade Shop" in selling or dealing in window shades in any manner?
>
> A. Never, except myself.
>
> * * * * *
>
> Q. During this time, to your knowledge, have you ever known of anyone, any place outside of Washington and the District of Columbia, or anywhere in the United States, dealing in or manufacturing window shades

and trading under the name of "The Shade Shop"?

A. I purchase material from every manufacturer of shade cloth and rollers in America. I have been in their offices and I have interviewed with managers and salesmen. *They have never known in their accounts or never received reply from any firm in the United States with the trade name "The Shade Shop."*

Q. *Other than yours?*

A. *Other than mine.* (Italics supplied.)

Counsel for respondents, on cross-examination, sought to detract from the force of this evidence by questioning Sammons' statement that the latter had been "in all the concerns' offices which have manufactured shades in the United States." In this, however, he was unsuccessful—Sammons explaining that there were but five of such manufacturers in this country. (R. 149.)

There is some evidence which shows that the identity of Sammons was known, his name being used in a number of cases in juxtaposition with "The Shade Shop," and in a few instances by itself—these uses being in connection with billheads, letterheads, advertisements, checks and receipts signed by him, an automobile truck operated by him, bank accounts maintained by him, a lease signed by him, and checks made payable to him. (R. 24, 27, 31, 32, 33–34, 36, 51, 53, 56, 70, 73, 74, 76, 79, 89, 92, 98, 99, 100, 101, 104, 105, 111, 119, 124, 129, 133, 135, 140–141, 169–170, 182–183, 209, 228, 229, 234,

298, 315, 334, 337–342, 350, 357, 358–360, 361–367, 398.)

In the spring of 1911, Sammons suggested to Hooper & Klesner, a partnership in the painting and decorating business, the desirability of locating at the southeast corner of Twelfth and H Streets NW., and that if this partnership would rent the premises, he (Sammons) would sublease part of the space. They agreed. (R. 121–122, 172–173, 279–280.) Sammons' sublease with the then partnership appears as Res. Ex. 6. (R. 358–360.) Respondent Hooper left the partnership in October, 1919, and the respondent Klesner continued the business under the old firm name. (R. 313.)

When "The Shade Shop" moved into joint occupancy of the premises at Twelfth and H Streets NW., rented by the firm Hooper & Klesner, Sammons lettered the words " The Shade Shop" upon one window facing on the Twelfth Street side and another on the H Street side, to indicate his establishment (R. 72–73, 83, 280), and conducted his business, independently, as before, under the name "The Shade Shop" (R. 280). Hooper & Klesner occupied the front and Sammons the rear part of the store (R. 24, 72), with a partition between. The partnership continued its business of painting and decorating, and Sammons his business "The Shade Shop," always as an independent concern, in the work of making window shades.

Respondent Klesner testified that there was no competition in the store between Sammons and his

firm. "We called him in in every instance, if he was there, to wait on the customers" (of "The Shade Shop"). (R. 331.) Klesner also stated emphatically that "there were not two firms operating in shades there." (R. 331.) Sammons testified that his name did not appear anywhere on the windows or building. (R. 174; see also R. 25, 26, 281.)

It appears from all of the testimony that the business of "The Shade Shop" gradually increased (R. 187–188), until some time in November, 1915, when Sammons, for reasons not disclosed, breached his lease and decided to remove to two doors down the street (733 Twelfth Street) from his then location with Hooper & Klesner (R. 177–178). This removal was made on a Sunday morning, and things were progressing peaceably until Sammons started to remove from the windows the signs "The Shade Shop," which he had paid for. (R. 126.) At this point Klesner objected very strenuously and emphasized his objection by flourishing a revolver. Klesner was arrested and confined, during which time Sammons removed his signs and moved to his new place of business. (R. 24, 74–76, 86–90, 126–128, 283–285, Com. Ex. 30.)

After Sammons had changed the location of "The Shade Shop," Klesner and his then partner Hooper, who were not on good terms with Sammons (R. 197, 258–259), decided to go at once (R. 130) into the window-shade business and to secure for themselves the business of this nature which

Sammons had developed. Their intention to appropriate to their own use the good will previously built up by Sammons appears from the testimony of Klesner:

> Q. Now, when Mr. Sammons left Twelfth and H Streets, what did you do, so far as the business of window shades was concerned?
>
> A. Why, he had put us in a peculiar position. You remember, he approached us. Previous to him approaching us on Eleventh Street, we were dealing with S. Kann Sons Co., getting our shades there. When he broke his lease with us and moved out, we could not very well keep on dealing with him after that, and, in the meantime, Kann Sons had given up their shade shop and we knew of no other place to get shades the way we had previously gotten them made, and *we got together and talked it over and decided to carry on the window-shade business the same as Sammons had done, using the rear part of the store to operate in,* and in that way help contribute to the rent that he had refused to pay.
>
> Q. Did you consider that the rent, the whole of the $83.33, at that time a burden, or more than you felt you could pay?
>
> A. Yes, indeed. It was far more than we could afford to pay out of our little bit of shade work we were then doing. We felt, *inasmuch as since the public had come there and begin to come there* and as we had tried to get shade work more than we had tried to get before, *and he, being there, naturally*

> *would cause other people to know there were shades to be had in that store, we thought we may as well continue and put an extra in there, and try to make it pay that way; as it appeared later on we did make that end of it pay.* (R. 287.) (Italics supplied.)

In this connection, see also R. 28–29, 124.

In order to carry out this purpose, respondents put as a sign upon their windows the words "Shade Shop," *with letters of the same shape, size, and color, and in the identical location where Sammons had had his sign "The Shade Shop."* (R. 130, 132, 286; Com. Ex. 31 and 32, Res. Ex. 1.) They had letterheads and billheads prepared, upon which appeared, *for the first time*, the words *"Shade Shop"* (R. 257, 268, 313.)

The next step taken by the respondents was to cause their business to be listed in the telephone directory as "Shade Shop." It will be recalled that Sammons moved his establishment ("The Shade Shop") from Twelfth and H Streets NW. to 733 Twelfth Street in November, 1915. On January 3, 1916, the respondents contracted with the Chesapeake & Potomac Telephone Company (R. 49, 50) to list their place of business in the local telephone directory, both in the main alphabetical listing and in the classified business listing, as "Shade Shop, Hooper & Klesner." And these listings were inserted in said directories immediately *above* the listings of "The Shade Shop," Sam-

mons' establishment. (Com. Ex. 11, 12, 13, and 74.) They appeared as follows:

Main 4763 Shade Shop, Hooper & Klesner. S. E. Cor. 12th & H, NW.
Main 4874 Shade Shop The, S. S. Sammons, window shades. 733, 12th, NW.
—(Commission's Exhibit No. 12.)

Main 4763 Shade Shop, Hooper & Klesner. S. E. Cor. 12th & H, NW.
Main 4874 Shade Shop The, S. S. Sammons, window shades. 733, 12th, NW.
—(Commission's Exhibit No. 13.)

SHADE SHOP
HOOPER & KLESNER
Factory and Stores: 929 H Street N. W.
Main 4763

Main 4874 Shade Shop, The 830 13th N. W.

"THE SHADE SHOP"
W. Stokes Sammons, Prop.
Exclusive Manufacturers of
WINDOW SHADES
830 13th St. N. W. Main 4874
—(Commission's Exhibit No. 74.)

The telephone company soon afterwards, in order to eliminate what was considered nonessential matter, dropped the words "Hooper & Klesner" from the previous listing of "Shade Shop, Hooper & Klesner" (R. 54–55), and, allowing for changes of address, the main listings, for both respondents and Sammons, have been (Com. Ex. 11):

Shade Shop, 741—12th St. NW. Main 4763.
Shade Shop, 830—13th St. NW. Main 4874.

Respondents, however, have made no effort to have the firm name "Hooper & Klesner" restored to its original position following "Shade Shop." (R. 55, 57.) Furthermore, they have not requested the telephone company to drop the misleading listing of "Shade Shop," although such a request would have been readily acceded to, if made. (R. 57.)

**Deception of the Public**

Paragraph Seven of the Commission's findings as to the facts (R. 382–383) reads, in part, as follows:

> * * * there has been considerable confusion in the trade, and customers who have known or heard of "The Shade Shop," as conducted and carried on by the said Sammons, and who desired to purchase window shades therefrom, have been confused and deceived by the sign "Shade Shop," used as aforesaid by the respondent, and have gone to the storeroom of the respondent and there purchased window shades of him in the mistaken belief that they were dealing with the said W. Stokes Sammons; and that on certain occasions, when customers had entered respondent's store and made specific inquiries as to whether this was the storeroom operated by the said Sammons they were deceived by the employees of the respondent and were led to believe that it was the storeroom and the location and place of business of the said W. Stokes Sammons, when, in truth and in fact, the said Sammons was

> operating and conducting his business under the name of "The Shade Shop," at 723 Twelfth Street NW., as aforesaid. That the use of the term "Shade Shop" by the respondent in the listing and advertising sections of the telephone directory has caused and is causing similar confusion to the window-shade purchasing public throughout the District of Columbia, and the respondent, Alfred Klesner, is now carrying such paid advertisement in the said telephone directory, and suffering and permitting the said telephone company to list his business under the trade name of "Shade Shop" out of spite to said Sammons, with the purpose and intent to injure his said competitor in his window-shade business.

The above finding is supported by evidence in the record. (R. 11–13, 17–19, 20–22, 25, 27, 30, 32, 36–44, 37–38, 39, 45–47, 58–60, 63–65, 94–95, 147, 149–150, 158, 181, 182, 188, 195–196, 201–204, 223, 243, 253–254, 257, 263, 268, 288, 289, and 303 et seq.)

The facts found were based upon evidence taken (R. 10–371) on the issues raised by the Commission's complaint (R. 2–4) and respondents' answer (R. 5–7), and were embodied by the Commission in its report upon the facts (R. 379–383), and resulted in the issuance of an order requiring the respondents to cease and desist from doing business in the District of Columbia under the name "Shade Shop" (R. 384), "standing alone or in conjunction with other words." This was because when

the name "Shade Shop" was used by respondents, it was, for the most part, used in juxtaposition with the name of the former partnership "Hooper & Klesner."

The respondent failed and refused to obey the order, and the Commission thereupon applied to the Court of Appeals of the District of Columbia for a decree of enforcement. Briefs were filed and oral argument had. The Court, however, without considering the merits of the case, held that it was without jurisdiction in the premises and dismissed the petition. (R. 419.)

Upon the application of the Commission, this Court, upon certiorari, reviewed and reversed the judgment of the Court of Appeals and remanded the cause for further proceedings—concluding that the words "circuit court of appeals of the United States," in the Trade Commission Act, included the Court of Appeals of the District of Columbia as the appellate tribunal to be charged with the duty in the District of Columbia. (274 U. S. 145.)

After reargument, the Court below dismissed the Commission's petition for enforcement, on the ground that the name "Shade Shop," as used by the respondent, was a generic term, and merely descriptive of the business carried on by him, and that therefore the prior and exclusive use of this term by another concern engaged in the window-shade business was not such as to be entitled to legal protection. (25 F. (2d) 524; R. 424.) The time for filing petition for writ of certiorari has been extended to August 15, 1928. (R. 436.)

B. REASONS RELIED ON FOR THE ISSUANCE OF THE WRIT

(1) The Commission found, and the evidence supports the finding (R. 10), that the public was being deceived by the use of the name "Shade Shop" into dealing with respondent, when they intended to deal with "The Shade Shop." The action of the Court in setting aside the Commission's order leaves this condition of deception uncorrected and respondent free to continue to deceive. The condition should be corrected, and relief can come from this Court only.

(2) The Court failed to give effect to the Commission's finding of intention on the part of respondent to appropriate the business of Sammons by deceiving the public, which finding is supported by evidence (R. 6–10). This is, perhaps, due to the attitude of the Court, as expressed in its opinion: "We think, however, that the case can be disposed of *without an analysis of the testimony.*" (R. 425.)

(3) The Court has not given proper effect to the applicable decisions of this Court under the Federal Trade Commisssion Act. (Infra, 17–26.)

(4) The decision of the Court is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Juvenile Shoe Company, Inc.* v. *Federal Trade Commission*, 289 Fed. 57, which held that, while the word "Juvenile" was not susceptible of appropriation as a trade-mark for shoes, yet a corporation ("Juvenile Shoe Corporation") which had adopted that name under which to market children's shoes manufactured by it, was en-

titled to protection against the use of such name by a subsequent competitor ("Juvenile Shoe Company") in the same line of business; and that the Commission was amply justified in issuing an order commanding and enjoining the later comer to cease and desist from such unfair competition. The Juvenile Shoe Company thereupon applied to this Court for a writ of certiorari, urging, as the *"principal reason"* for the issuance thereof, *"the conflict between the decision of the Circuit Court of Appeals in this case and the decisions of the Supreme Court."* This Court, however, denied the petition. (263 U. S. 705.) And while "the refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the decree that is sought to be reviewed" (*Hamilton Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251, 258), nevertheless it is respectfully urged that the refusal of this Honorable Court to acquiesce in petitioner's "principal," and, indeed, *only* reason for the issuance of the writ (i. e., the alleged conflict between the decision of the Circuit Court of Appeals and those of this Court, on this question) is not without significance.

Wherefore, it is respectfully submitted that the writ of certiorari should issue as prayed.

WILLIAM D. MITCHELL,
*Solicitor General.*

ROBT. E. HEALY,
*Chief Counsel,*
*Federal Trade Commission.*

AUGUST, 1928.

## BRIEF

### I

### THE OPINION OF THE COURT BELOW

The opinion of the Court of Appeals of the District of Columbia is reported in 25 F. (2d) 524.

### II

### JURISDICTION

This was a petition to the Court of Appeals of the District of Columbia for the enforcement of an order of the Federal Trade Commission, entered under authority of Section 5 of "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes. (38 Stat. 717.) The jurisdiction of the Court below was invoked under the authority of Section 5 of the Act. The Court of Appeals dismissed the petition for want of jurisdiction. (R. 419.) This Court, upon certiorari, reversed the judgment of the Court of Appeals and remanded the cause for further proceedings. (274 U. S. 145.) After reargument, the Court below dismissed the Commission's petition. (R. 424.)

The decree of the Court of Appeals of the District of Columbia to be reviewed was entered April 2, 1928. (R. 432.) On June 22, 1928, on motion of the Solicitor General and the Chief Counsel of the Federal Trade Commission (Petitioner herein), Mr. Justice Van Devanter signed an order extending the time within which petition for writ of certi-

orari may be filed in this cause to and including August 15, 1928. (R. 436.)

The jurisdiction of this Court is invoked under Section 5 (paragraphs 4 and 5) of the Federal Trade Commission Act (38 Stat. 717), and under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (*Federal Trade Commission* v. *Gratz*, 253 U. S. 421; *Federal Trade Commission* v. *Klesner*, 274 U. S. 145.)

## III

### STATEMENT OF THE CASE

A full statement of the case has been given under the heading, "A—The Facts," in the petition (supra, pp. 1–11), and, in the interest of brevity, will not be repeated at this point.

## IV

### SPECIFICATION OF ERRORS

It is submitted that the Court below erred:

(1) In holding that there was no evidence to support the Commission's finding that the public was being deceived by the use of the trade name "Shade Shop" by the respondents.

(2) In failing to give effect to the Commission's finding of intention on the part of respondents to appropriate the business of a competitor by deceiving the public, when such finding is supported by evidence.

(3) In not holding that the acts practiced by the respondents in this cause constituted unfair meth-

ods of competition, within the meaning of Section 5 of the Federal Trade Commission Act, and warranted the issuance of the Commission's order to cease and desist.

(4) In holding that the trade-name "The Shade Shop" was a purely generic or descriptive term.

(5) In holding that a trade-name consisting of a generic or descriptive term, and, as such, not susceptible of exclusive appropriation, is not entitled to protection against fraud on the part of a subsequent user.

(6) In not giving effect to the applicable decisions of this Court under the Federal Trade Commission Act.

## V

### ARGUMENT

**1. The term "unfair methods of competition," as used in the Federal Trade Commission Act, includes practices opposed to good morals because characterized by deception and fraud**

This Court, in *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 427, said:

> The words "unfair methods of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as *opposed to good morals because characterized by deception, bad faith, fraud* or oppression, or as against public policy because of their danger-

> ous tendency unduly to hinder competition or create monopoly. (Italics supplied.)

This same definition is referred to with approval in *Federal Trade Commission* v. *Beech-Nut Packing Company,* 257 U. S. 441, 453; *Federal Trade Commission* v. *Sinclair Refining Company,* 261 U. S. 463, 475; and *Federal Trade Commission* v. *Raymond Bros.-Clark Co.,* 263 U. S. 565, 572. The same rule was applied also in *Federal Trade Commission* v. *Winsted Hoisery Company,* 258 U. S. 483, 493, 494, as the following excerpt shows:

> The labels in question are literally false, and, except those which bear the word "Merino," are palpably so. All are, as the Commission found, calculated to deceive and do in fact deceive a substantial portion of the purchasing public. * * * The facts show that it is to *the interest of the public* that a proceeding to stop the practice be brought. And they show also that the practice constitutes an unfair method of competition as against manufacturers of all wool knit underwear and as against those manufacturers of mixed wool and cotton underwear who brand their product truthfully. For when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods. * * * As a *substantial part of the public was still misled* by the use of the labels which the Winsted Company employed, *the public had an interest in stopping the practice* as wrongful; and

> since the business of its trade rivals who marked their goods truthfully was necessarily affected by that practice, the Commission was justified in its conclusion that the practice constituted an unfair method of competition. (Italics supplied.)

And the deception, the fraud—in other words, "the essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another." (*Howe Scale Company* v. *Wyckoff, Seamans & Benedict,* 198 U. S. 118, 140.)

**2. Proceedings under Section 5 of the Federal Trade Commission Act for the prevention of unfair methods of competition are based upon the public interest**

In the excerpt from the Winsted Hosiery case (supra), it is noted that emphasis is placed on the "interest of the public" in the proceeding. Presumably this was a reference to the language of the statute, Section 5 of which, after declaring unfair methods of competition in commerce to be unlawful and empowering and directing the Commission to prevent them, says (par. 3):

> Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and *if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public,* it shall issue and serve upon such person, partnership, or corporation a complaint * * *. (Italics supplied.)

This represents an important development over the law with respect to unfair competition at the common law, where the action was between two private parties only, and the plaintiff, to succeed, must show that a property right had been invaded.

It is true that in such cases the courts speak of the deception of the public as a part of the wrong. See *G. W. Cole Co.* v. *American Cement & Oil Co.* (C. C. A., 1904), 130 Fed. 703; *Sartor* v. *Schaden* (Iowa, 1904), 101 N. W. 511. But the courts use evidence of the deception of the public as a test to determine whether the plaintiff has really suffered an injury to a property right. *C. F. Simmons Co.* v. *Mansfield Drug Co.* (Tenn. 1893), 23 S. W. 165; *Borthwick* v. *The Evening Post* (England, 1888), L. R. 37, Ch. D. 449. In a label or trade-mark case in unfair competition at common law the plaintiff's right of action is based upon his right of property in the label or trade-mark and the infringement thereof by the defendant, and this is so in equity cases, even though the defendant may show absence of intention to defraud and to compete unfairly. *Chapin-Sacks Mfg. Co.* v. *Hendler,* 254 Fed. 553, 556. But in a private case the plaintiff may not be able to convince the court that he has a valid trade-mark, yet he will nevertheless succeed if he is able to show that to the word or words which are the basis of his invalid trade-mark the public has given a secondary meaning. And because in this secondary

meaning there may be a property right the courts will in that event allow a recovery of damages or decree an injunction. But whether the case is one of infringement of a trade-mark or of unfair trading arising out of secondary meaning the plaintiff must show the invasion of a property right.

On the other hand, cases of unfair methods of competition under the Federal Trade Commission Act are cases based upon the theory of protection to the public whose rights are infringed or jeopardized by confusion of goods, or their composition or their sources of production, brought about by the unfair trade methods of the defendant. It is not necessary, though it is often helpful, then, to show infringement of trade-mark, or to show secondary meaning. It is enough to show that the acts of the defendant deceive or tend to deceive the public.

The opinion of the Court below is based, apparently, upon the theory that unless unfair competition at the common law is made out the case must fail. But if the learned Justice takes the position that the term "unfair methods of competition" in the Federal Trade Commission Act embraces no other class of cases than this, he is in error. This was the position unsuccessfully taken by counsel for the petitioner in the *Royal Baking Powder Company* v. *Federal Trade Commission,* 281 Fed. 744. The Circuit Court disposed of that argument in the following language:

> In the American Washboard Company case the complainant was the manufacturer

of a washboard having the rubbing face made of aluminum and upon which it used the word "Aluminum" as a trade name. It was the only manufacturer of such boards in the country, having secured a monopoly of all the sheet aluminum produced which was suitable for use in their manufacture. The bill which asked for an injunction alleged that the defendant had placed on the market a washboard on which it used the word "Aluminum," by reason of which the public was deceived into buying it as a genuine aluminum washboard, although there was none of that metal in its composition. The Circuit Court of Appeals for the Sixth Circuit, then composed of Judges Taft, Lurton, and Day, each of whom later became a member of the Supreme Court, held that the facts alleged did not entitle the complainant to relief, since it was not shown that purchasers bought defendant's boards in the belief that they were made by complainant. In the course of the opinion, which was written by Judge Day, he said:

"Can it be that a dealer who should make such articles only of pure wool could invoke the equitable jurisdiction of the courts to suppress the trade and business of all persons whose goods may deceive the public? We find no such authority in the books, and are clear in the opinion that if the doctrine is to be thus extended, and all persons compelled to deal solely in goods which are exactly what they are represented to be, the

remedy must come from the legislature and not from the courts."

The above case illustrates the reason which led Congress to enact the statute creating the Federal Trade Commission and making *unfair methods* of competition unlawful and empowering the Commission to put an end to them. By that statute the identical situation which the court in the above case said it was beyond its power to suppress has been brought within the jurisdiction of the Federal Trade Commission—created to redress unfair *methods* of competition. Before the enactment of the Federal Trade Commission Act the courts appear to have had jurisdiction of an action for unfair competition only when a property right of the complainant had been invaded. But the Federal Trade Commission Act gave authority to the Commission itself when it had reason to believe that any person, partnership, or corporation was using any unfair *method* of competition in commerce, *if it appeared to it that a proceeding by it in respect thereof "would be to the interest of the public"* to bring such offending party before it to answer to its complaint and after a hearing could, upon good cause shown, require it to cease and desist from its unlawful methods.

The answer to the contention of the counsel for the petitioner is found in a recent decision of the Supreme Court, which has not yet been published. In *Winsted Hosiery Company* v. *Federal Trade Commission,* 272

Fed. 957, this court had before it the method of an underwear manufacturing company of branding its products as wool, merino, etc., when in fact they were composed only partly of wool or merino. A great deal of testimony had been taken which this court thought fully established that the trade was not misled in any respect by the label complained of. But some witnesses testified that in their opinion some part of the consuming public was or might be misled into thinking the underwear so described was pure wool. It also appeared that the method of branding which this manufacturer pursued was in accord with the general custom and practice of the underwear trade throughout the United States and was well known to and recognized by the distributors of underwear in this country. We therefore held that the order of the Federal Trade Commission requiring the particular manufacturer to desist from such methods was error and did not constitute unfair competition. The reversal of the case by the Supreme Court has established the principle that advertisements which are false in fact constitute an unfair method of competition although it was one commonly practiced and not intended to mislead the trade. The labeling of commodities in such a way as to *deceive the public* is an unfair method of competition. The manufacturer must not brand his goods as "wool" when they are part wool and part cotton. And it is now made plain that the Statute has invested the Commission with jurisdiction to

order anyone who misrepresents the quality of his goods in his advertising to cease and desist from such unfair methods of competition.

In the case now before the court the Commission was convinced that its opinion was justified by the evidence that the petitioner in the use of its labels, and otherwise, was employing false and misleading advertising which was calculated and *designed to deceive the public and which did deceive the public* into buying a phosphate baking powder believing that it was the Dr. Price's Baking Powder which had been well known for 60 years as a cream of tartar powder, concealing and obscuring the fact that it was a radically different powder. The case is plainly governed by the principle laid down in the Widsted Hosiery Company case. (Italics supplied.)

In *Warner & Co.* v. *Lilly & Co.*, 265 U. S. 526, 532, this Court said:

Nevertheless, the right to which respondent is entitled is that of being protected against unfair competition, not of having the aid of a decree to create or support, or assist in creating or supporting, a monopoly of the sale of a preparation which everyone, including petitioner, is free to make and vend. The legal wrong does not consist in the mere use of chocolate as an ingredient, but *in the unfair and fraudulent advantage which is taken of such use to pass off the product as that of respondent. The use dissociated from the fraud is entirely lawful,*

*and it is against the fraud that the injunction lies.* (Italics supplied.)

**3. The owner of a trade name which is purely descriptive is entitled to protection from fraud and unfair dealing on the part of a competitor**

The Commission contends that enough has been shown by the record to warrant the belief that the trade name "The Shade Shop" was and is not used by Sammons in a purely descriptive manner. However, if this Court holds that the term is purely descriptive, yet, in view of the deception and fraud on the part of the respondents disclosed by the record (supra, pp. 6–11), it is submitted that the rule laid down by this court in *Warner & Co.* v. *Lilly & Co.* (supra) applies.

In the interest of brevity, a detailed discussion of the cases in support of this contention will not be indulged in at this time. However, there is set forth below a list of some of the cases in which relief has been accorded to the users of trade names which were purely or partially descriptive:

*American Clay Mfg. Co.* v. *American Clay Mfg. Co.* (*of N. J.*), 198 Pa. St. 189–191, 47 Atl. 936.

*American Grocery Publishing Assn.* v. *The Grocery Publishing Co.*, 25 Hun. (N. Y.) 398.

*Randall* v. *British & American Shoe Company*, 2 Ch. 354, 19 R. P. C. 393.

*Pettes* v. *American Watchman's Clock Company*, 89 App. Div. (N. Y.) 345, 85 N. Y. Supp. 900.

*Army & Navy Cooperative Society* v. *Army, Navy and Civil Service Cooperative Society of South Africa,* 19 R. P. C. 574–576.

*Viano* v. *Baccigalupo,* 183 Mass. 160, 67 N. E. 641.

*Knott* v. *Morgan,* 2 Keen, 213.

*Weinstock, Lubin & Co.* v. *Marks,* 109 Cal. 529, 42 Pac. 142.

*National Folding Box and Paper Co.* v. *National Folding Box Co.,* 43 Weekly Reporter, 156.

*Girogosian* v. *Chutjian,* 194 Mass. 504, 80 N. E. 647.

Nims on Unfair Competition and Trade Marks, 2d ed., 110.

*McFall Electric & Telephone Co.* v. *McFall Electric Co.,* 110 Ill. App. 182.

*Cady* v. *Schultz,* 19 R. I. 193, 32 Atl. 915.

*Fuller* v. *Huff et al.,* 104 Fed. 141, 143–144.

*Koebel* v. *Chicago Landlords' Protective Bureau,* 71 N. E. 362, 210 Ill. 176.

*Zweck* v. *Aberdeen Laundry & Dry Cleaning Co.,* 183 N. W. 118.

*German American Button Co.* v. *Heymsfeld,* 156 N. Y. Supp. 223.

*O. K. Bus and Baggage Co.* v. *O. K. Transfer and Storage Co.,* 165 Pac. 136.

*Dunston* v. *Los Angeles Van & Storage Co.,* 165 Cal. 89, 94; 131 Pac. 115.

*Merchants' Detective Association* v. *Detective Mercantile Agency,* 25 Ill. App. 250.

*Material Men's Mercantile Assn.* v. *New York Material Men's Mercantile Assn.,* 155 N. Y. Supp. 706.

*Motor Accessories Mfg. Co.* v. *Marshalltown Motor Material Mfg. Co.*, 167 Iowa, 262, 149 N. W. 184.

**4. The trade name "The Shade Shop" was not used by Sammons merely to indicate the character of business carried on by him**

While the term "The Shade Shop," as used by Sammons, might to a certain extent be considered a descriptive term and to indicate that "shades" might be purchased at his establishment, yet it is by no means as descriptive of the character of his business as the terms "barber shop," "candy shop," "hardware store," and "jewelry store" are indicative of the businesses carried on at such establishments. For, in the case of the four last-named types of business, it is not necessary for the prospective customers or purchaser, before entering the store in question, to carefully consider, for instance, what particular type of haircutting is done, or whether the candy, hardware, or jewelry is to be used for any particular purpose. Whatever type of haircut is desired may be obtained at the ordinary barber shop, and the same rule applies to the other articles anmed.

On the other hand, the trade name "The Shade Shop" may mean that any one of several kinds of "shades" may be purchased therein, such "shades" having entirely dissimilar uses. They may be window shades, lamp shades, sun shades, porch shades, or eye shades.

The evidence shows that Sammons did not use the name "The Shade Shop" merely to denote that

he made and sold window shades. Practically all of his commercial activities were carried on under this name. Under this name he advertised in newspapers, periodicals, and telephone directories, and by signs on his place of business; established bank accounts, purchased goods, conducted correpondence, and receipted bills. Under this name, also, telephone inquiries were made of him, written orders were sent to him for goods, supplies were shipped to him, bills and checks were made out to him, and business houses with whom he had dealings carried his accounts. (Supra, pp. 2–3.)

Furthermore (Record, 149), the uncontradicted testimony of the witness Sammons shows that during the twenty years he had been in business in the District of Columbia, no one other than himself had used the trade name "The Shade Shop" in selling or dealing in window shades in any manner. And he further testified that he purchased material from every manufacturer of shade cloth and rollers in America, and, as a result of interviews with their managers and salesmen, "they have never known in their accounts or never received reply from any firm in the United States with the trade name 'The Shade Shop,'" other than Sammons's establishment.

**5. The Commission's findings of (a) intent on the part of respondent to appropriate the business of Sammons by deceiving the public; and (b) that the public was deceived by the respondent's use of the trade name "Shade Shop" into dealing with respondent when they intended to deal with Sammons "The Shade Shop"—are supported by the evidence**

One of the considerations which induced the Court below to dismiss the Commission's petition was its conclusion that "there is a total absence of anything showing a use by defendant which would justify the charge of unfair competition." (R. 427.) It amplifies this by its remarks on page 428, viz, "In the absence of any showing that defendant was attempting to dispose of his goods under the pretense that they were the goods of Sammons, there is no ground whatever in law or reason for invoking the doctrine of unfair competition"; and "The record is silent as to any attempt on the part of defendant or his employees to deceive or entice Sammons' customers into dealing with him."

But Paragraph Seven of the Commission's findings as to the facts (R. 382–383) reads, in part, as follows:

> That respondent, Alfred Klesner, incensed and angered at Sammons because of his arrest and the circumstances connected with the removal of Sammons' sign as aforesaid, has refused to speak to Sammons since said trouble in the storeroom above referred to, and has during all this period continued this attitude of hatred and malice toward Sammons, so that immediately after Sammons had removed his business, as aforesaid, re-

spondent, Klesner, conferred with his then partner, Harry Hooper, and it was decided that they would immediately enter upon the the business of dealing in window shades, and that they would go after and get the window-shade business and trade which had been built up on this corner and in this storeroom by the said W. Stokes Sammons, trading under the name of "The Shade Shop"; and in pursuance of this plan and policy and with the further purpose of injuring the said W. Stokes Sammons, the respondent and his said partner placed upon the two windows of their storeroom the sign "Shade Shop," using the same size, style, and color of lettering, and in the same place as that of the sign "The Shade Shop" used theretofore by the said Sammons; and in furtherance of this plan they also placed upon their letterheads and billheads the words "Shade Shop," * * * and there has been considerable confusion in the trade, and customers who have known or heard of "The Shade Shop," as conducted and carried on by the said Sammons, and who desired to purchase window shades therefrom, have been confused and deceived by the sign "Shade Shop," used as aforesaid by the respondent, and have gone to the storeroom of the respondent and there purchased window shades of him in the mistaken belief that they were dealing with the said W. Stokes Sammons; and that on certain occasions, when customers had entered respondent's store and made specific

inquiries as to whether this was the storeroom operated by the said Sammons they were deceived by the employees of the respondent and were led to believe that it was the storeroom and the location and place of business of the said W. Stokes Sammons, when in truth and in fact, the said Sammons was operating and conducting his business under the name of "The Shade Shop," at 723 Twelfth Street NW., as aforesaid. That the use of the term "Shade Shop" by the respondent in the listing and advertising sections of the telephone directory has caused and is causing similar confusion to the window-shade purchasing public throughout the District of Columbia, and the respondent, Alfred Klesner, is now carrying such paid advertisement in the said telephone directory, and suffering and permitting the said telephone company to list his business under the trade name of "Shade Shop" out of spite to said Sammons, with the purpose and intent to injure his said competitor in his window-shade business.

Perhaps the failure of the Court below to discover evidence in support of the Commission's findings is to be found in its attitude, as expressed on page 425: "We think, however, that the case can be disposed of *without an analysis of the testimony.*" The printed transcript of the record in this case consists of over 400 pages, and the testimony itself (with the exhibits introduced in connection therewith) of 360 pages. The findings of the Commis-

sion in the respect indicated are clear and amply supported by the evidence in this record (supra, pp. 6–11). And, this being the case, the action of the Court below was unwarranted and should be reversed.

**6. If the Commission's findings are supported by testimony, they are by the statute made conclusive**

This principle is well established.

Paragraph 4 of Section 5 of the Trade Commission Act, provides that—

> The findings of the Commission as to the facts, if supported by testimony, shall be conclusive.

In *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568, 580, Mr. Justice McReynolds said:

> Manifestly, the court must inquire whether the Commission's findings of fact are supported by evidence. *If so supported, they are conclusive.* (Italics supplied.)

In the same case, Mr. Chief Justice Taft used the following language:

> I think it of high importance that we should scrupulously comply with the evident intention of Congress that the Federal Commission be made the fact-finding body and that the Court should in its rulings preserve the Board's character as such and not interject its views of the facts where there is any conflict in the evidence (p. 583).

Unless this Honorable Court grants review of the decree of the Court below, the result will be that that portion of paragraph 4 of Section 5 of the Federal Trade Commission Act, which provides that "the findings of the Commission as to the facts, if supported by testimony, shall be conclusive," may be completely nullified by the failure or refusal of a Circuit Court of Appeals to analyze or consider the evidence adduced by the Commission in support of its findings—and legal principles enunciated which, while correct in the abstract, would be totally inapplicable if the facts were stated.

The attitude of the Court of Appeals of the District of Columbia in declining to analyze the testimony in this case is in sharp contrast with the action of this Honorable Court in *Warner & Co.* v. *Lilly & Co.* (265 U. S. 526, 528), in which Mr. Justice Sutherland said:

> The issue of unfair competition, on which the courts below differed, presents a question of more difficulty. The testimony is voluminous, *more than two hundred witnesses* having been examined; but, *since the question with which we are now dealing is primarily one of fact, we have found it necessary to examine and consider it.* (Italics supplied.)

In the instant case, where an appraisal of the facts is of vital importance but was declined by the Court below, there were but twenty-one witnesses.

**7. The use by respondents of the partnership name "Hooper & Klesner" in juxtaposition with the trade name "Shade Shop," not sufficient to distinguish respondents' business from that of their competitor Sammons**

The Court below (R. 429) calls attention to the fact that when the name "Shade Shop" was used by respondents, it was used in connection with the name of the former partnership "Hooper & Klesner"—citing this as a sufficient distinguishing mark to prevent the possibility of fraud. The complete answer to this is found in the proof that despite the use of the firm name the public has been deceived into believing the establishment to be that of Sammons. Moreover, to a substantial portion of the purchasing public, the term "Shade Shop" meant no one in a personal sense, but simply a place of business. The use of the former partnership name "Hooper & Klesner," therefore, by the respondents, in connection with "Shade Shop," did not convey any *new* meaning to those formerly doing business with Sammons, who did not know his identity. For all they knew, it may have signified that the long-time proprietor of "The Shade Shop" had finally decided to disclose his identity. And, in their minds, this long-time proprietor may have been "Hooper & Klesner" and not Sammons. In this connection, see the testimony of Mrs. Bowie (R. 19–20), and Mrs. Lines (R. 47).

## VI

### CONCLUSION

When this proceeding was before this Honorable Court on the question of jurisdiction (274 U. S. 145, 151–152), the following language was used:

> The statute is clear in its direction that the Commission shall make orders preventing persons engaged in the District from using the forbidden methods. *Therefore the Commission was authorized to make the order which was made in this case.* (Italics supplied.)

Again (p. 159):

> They were not left in the air without any sanction against *a defiant litigant, as would be the result in the present case, were the view we have taken not to prevail.* (Italics supplied.)

It is submitted that the decision of the Court below was erroneous, and that the decree should be reversed.

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